IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SUSSEX COUNTY REPUBLICAN COMMITTEE, THE REPUBLICAN STATE COMMITTEE OF DELAWARE, and BRIAN PETTYJOHN,	)	C.A. No.
Plaintiffs,	)	
v.	)	
SUSSEX COUNTY DEPARTMENT OF ELECTIONS, KENNETH L. McDOWELL, ELAINE MANLOVE, and DELAWARE DEPARTMENT OF ELECTIONS,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, by and through their undersigned counsel, hereby submit this Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order.

I. NATURE AND STAGE OF PROCEEDINGS

On October 25, 2012, Sussex County Republican Committee (the "Sussex Committee"), the Republican State Committee of Delaware (the "State Committee"), and Brian Pettyjohn (collectively, the "Plaintiffs") filed a Verified Complaint (the "Complaint"), which is incorporated herein by reference, seeking relief against the Sussex County Department of Elections (the "County Department of Elections"), Kenneth L. McDowell, Director of the County Department of Elections (the "Director"), the Delaware Department of Elections (the "State Department of Elections"), and Elaine Manlove, the Commissioner of the State Department of Elections ("Commissioner Manlove") (collectively, the "Defendants") as a result of the Defendants refusal to include Mr. Pettyjohn on the ballot for the upcoming election in the 19th Senatorial District of Delaware. Contemporaneously therewith, Plaintiffs filed a Motion for

a Temporary Restraining Order. This is Plaintiff's Memorandum of Law in Support of its Motion for a Temporary Restraining Order.

II. STATEMENT OF FACTS

On or about September 11, 2012, a Republican primary was held to determine the candidate for the Republican Party for the 19th State Senatorial District. Mr. Eric Bodenweiser defeated Mr. Joseph Booth, and was declared the winner of the primary, thereby becoming the Republican Party's candidate for State Senate for the 19th State Senatorial District. Compl. at p. 2. Thereafter, Mr. Bodenweiser became the target of an investigation by the Delaware State Police and Mr. Bodenweiser's level of campaign activity diminished. *Id.*

On or about Friday, October 12, 2012, in an email to the Delaware Republican Party, Mr. Bodenweiser announced that he was "suspending" his campaign for personal and family reasons. All attempts by the Republican Party to reach Mr. Bodenweiser after his email have been unsuccessful. *Id.* Mr. Bodenweiser made his "suspension" permanent on October 17 by filing with the Sussex County Department of Elections offices papers to withdraw his name as a candidate. That same evening, the Sussex Committee decided to replace Bodenweiser with the name of Mr. Brian Pettyjohn on the ballot. *Id.* at pp. 2-3.

The next day, the Sussex Committee submitted a Supplemental Certificate of Nomination to the Sussex County Department of Elections, a copy of which is attached as Exhibit A. *Id.* at p. 3. Title 15, Section 3306(a) of the Delaware Code ("Section 3306"), Supplemental Certificates of Nomination, provides:

> [w]henever it shall be determined, subsequent to the dates specified in §3303 of this Title, that ***a duly nominated candidate will be unable to serve if elected because of death, physical, mental or other incapacity***, the State, county or city (if a municipality holds its election at the time of the general election) committee shall convene within twenty-four hours of said

> determination to authorize the filing of a supplemental certificate of nomination for a substitute candidate, or to decline to issue such a certificate. However, in the case of the death of a candidate, said committee may convene within a reasonable period of time sufficient to have the new candidate's name placed on the ballot, but in no case later than five days from the date of the death.
>
> (emphasis provided).

By return letter also dated October 18, 2012, Commissioner Manlove responded, advising that mere withdrawal from the race did not constitute "physical, mental or other incapacity." *Id.* at p. 3. She asked for further information about the nature of the incapacity. *Id.* A copy of this letter is attached as Exhibit B. Following receipt of Ms. Manlove's letter, party officials continued to try and contact Mr. Bodenweiser but were unsuccessful. *Id.*

On Monday, October 22, according to press reports, Mr. Bodenweiser was indicted on 113 felony counts and, later that day, voluntarily turned himself into police and spent the evening of October 22 in jail. *Id.* On the afternoon of October 23, Mr. Bodenweiser was released on bond. *Id.*

On October 23, an attorney for the Republican Party spoke with an attorney for the Department of Elections explaining the unsuccessful attempts to reach Mr. Bodenweiser and his refusal to return phone calls or emails. *Id.* at p. 4. The attorney for the Department of Elections nevertheless expressed his belief that something further should be provided to support the claim of "other incapacity." *Id.* The parties discussed obtaining an affidavit from Mr. Bodenweiser, and the Department's attorney indicated that an affidavit would be required. *Id.* Despite their attempts, Party officials have been unable to get any response from Mr. Bodenweiser. *Id.* Thus, in light of Bodenweiser's refusal to speak to the Party that nominated him, the requirement of an affidavit from Bodenweiser imposes a condition that cannot be met by the Plaintiffs.

On the afternoon of October 24, Commissioner Manlove issued a letter indicating that she would complete preparations for the upcoming election without a Republican candidate on the ballot. *Id.* A copy of this letter is attached hereto as Exhibit C. The letter makes no mention of the Republican Party's attempts to include Mr. Pettyjohn on the ballot nor its unsuccessful attempts to reach Mr. Bodenweiser. *Id.*

The Complaint in this matter was filed on October 25, 2012, in an effort to secure the inclusion of Mr. Pettyjohn's name as the republican candidate for the 19th State Senatorial District.

III. STATEMENT OF QUESTION INVOLVED

Whether the Court should issue a temporary restraining order prohibiting Defendants from completing the ballot preparation process without including the name of Brian Pettyjohn as the republican candidate for the 19th State Senatorial District.

IV. ARGUMENT

A. Standard for a Temporary Restraining Order

The test for the issuance of a temporary restraining order consists of three factors: (1) the threat of an imminent irreparable injury; (2) the probable merits of the plaintiff's claim; and (3) whether the harm to the plaintiff outweighs the injury the temporary restraining order itself might inflict on the defendant. *ACE Limited v. Capitial Re Corp.*, 747 A.2d 95, 102 (Del. Ch. 1999).

1. Irreparable Injury

If this Court denies the temporary restraining order requested herein, Plaintiffs and the citizens of the 19th Senatorial District will suffer irreparable injury. Defendants have made clear their intention to present a ballot that contains no Republican candidate for Senate in the 19th Senatorial District. Unless restrained by order of this Court, the Defendants will deprive the

Sussex and State Committees of the right to place a Republican candidate on that ballot and the citizens will be denied a choice. Those injuries will be irreparable.

2. The Merits of Plaintiffs' Claims

Section 3306 gives the Plaintiffs a right to substitute Mr. Pettyjohn's name on the ballot if Bodenweiser will be "unable to serve if elected because of death, physical, mental or other incapacity . . .." It is undisputed that Bodenweiser's legal issues and efforts to avoid the consequences of 113 felony convictions, have rendered him unable to campaign. Nor, having withdrawn his name from the ballot – a application which was accepted by Defendants – can Bodenweiser serve. Moreover, even if by some device the Defendants are able to undo their acceptance of Bodenweiser's withdrawal as a candidate, the Delaware Constitution prevents Bodenweiser from serving in the General Assembly if elected and convicted. *Del. Const.,* Art. II §16. In short, Bodenweiser and the Defendants have taken action to ensure that he cannot be elected and the Constitution would, in any event, prevent him from serving if any of the 113 felony counts result in conviction. Could one imagine a candidate any more incapacitated?

Section 3306 does not require than an incapacity be permanent. Of the four types of incapacity mentioned, only one – death – is invariably permanent. Thus, the fact that Bodenweiser might someday overcome his current circumstances isn't enough to demonstrate that he has not been incapacitated. Indeed, if Bodenweiser lay in a coma from which he might someday recover, would there be any doubt that he was, nevertheless, incapacitated?

Delaware Courts have urged that election officials apply our election laws in a way that serves the "transcendant" importance of our "most fundamental right" to vote:

> [e]lection laws are not merely technical creatures creating or regulating private rights. They are of transcending public importance, touching upon – indeed giving vitality to – the most fundamental of our rights. Thus, . . . the right of the public to an

> open, effective . . . election is a right that enters importantly into [any] analysis.

Bartley v. Davis, 1986 WL 8810, *9 (Del. Ch.) (copy attached as Exhibit D). In applying the Election Code, we must "try to give to the applicable legislative words the meaning and effect that best fosters and promotes the attainment of these purposes [i.e., the right to free and equal elections]." *Id.* at 10. Thus, in a case in which a statewide candidate was clearly required by statute to pay a fee simultaneous with his filing, Chancellor Allen permitted the candidate to remain on the ballot despite his failure to do so. To have applied the statute literally would have subverted the transcendent public interest. *Id.* The result should be no different here, where the Plaintiffs' inability to get an affidavit from Bodenweiser serves as a technical obstacle masking his obvious incapacity to serve.

Other states recognize these important principles as well. In New Jersey, the Democratic Party sought to replace its original candidate for United States Senate with a new candidate after the "deadline" for naming candidates had passed and the original candidate, Robert Torricelli, withdrew. Nothing in the statute allowed such replacement, but the New Jersey Supreme Court directed that the replacement candidate's name be placed on the ballot. In doing so, the Court observed:

> [i]t is in the public interest and the general intent of the election laws to preserve the two-party system and to submit to the electorate a ballot bearing the names of candidates of both major political parties as well as of all other qualifying parties and groups . . . statutes providing requirements for a candidate's name to appear on the ballot will not be construed so as to deprive the voters of the opportunity to make a choice. . .. We do not believe that our Legislature intended to limit voters' choice in a case where there is sufficient time to place a new candidate on the ballot and conduct the election in an orderly manner.

New Jersey Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1034-35, 1036, 1039 (N.J. 2002). Delaware law should be no different.

Ultimately, this case turns on the meaning of "physical, mental or other incapacity." Clearly, the General Assembly intended for this phrase to be given a broad meaning, as it used the words "physical," "mental" and "other." The Plaintiffs submit that, under the circumstances present here, it is obvious that Mr. Bodenweiser is incapacitated. He has been indicted on 113 very serious felony charges. He has already spent one night in jail. He ceased campaigning weeks ago and has refused to communicate with party officials. If elected, his term would begin immediately following the election and yet it is clear that his current disabling conditions will not be resolved before election day.

Given the important policy considerations at issue here, the General Assembly's intentionally broad language, and Mr. Bodenweiser's incapacity to serve if elected, Plaintiffs have a high likelihood of success on the merits of their claim.

3. Whether the Harm to Plaintiffs Outweighs Any Injury to Defendants.

The harm to Plaintiffs if Defendants are allowed to present a ballot that fails to include the candidate chosen by the Republican Party to replace Bodenweiser is enormous. On the other hand, there seems to be little risk of harm to Defendants if Pettyjohn is on that ballot. If Pettyjohn is elected but ultimately held to have been ineligible, the writ of quo warranto exists to remedy that situation and declare the Democrat candidate the rightful holder of the office. If one looks to more immediate concerns asserted by the Defendants regarding their duty to mail out absentee ballots, we submit that a delay of one or two days will not substantially burden Defendants and such delay could be overcome by overnight mailing if necessary.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the present circumstances warrant the issuance of a temporary restraining order enjoining the Defendants from completing the ballot preparation process without including the name of Brian Pettyjohn as the Republican candidate for the 19th Senatorial District of Delaware.

Dated: October 25, 2012

SAUL EWING LLP

/s/ William E. Manning
William E. Manning (#697)
Richard A. Forsten (#2543)
222 Delaware Ave. Suite 1200
Wilmington, DE 19801
(302) 421-6800 (phone)
(302) 421-6813 (facsimile)

Attorneys for Plaintiffs

EXHIBIT A

Sussex County Republican Committee
Box 388
Georgetown, DE 19947

October 18, 2012

HAND DELIVERY

The Honorable Elaine Manlove
Commissioner of Elections
905 S. Governor's Ave., Suite 170
Dover, DE 19904

Re: Issue Advocacy and Delaware Campaign Finance Laws

Dear Commissioner Manlove:

With this letter, pursuant to Title 15, Section 3306, I enclose a Supplemental Certificate of Nomination for Mr. Brian Pettyjohn as the Republican candidate for State Senate for the 19th State Senate District. This is being filed in light of the unilateral "withdrawal" by Mr. Eric Bodenweiser as the Republican for that office, which your office has received and accepted. As you know, Section 3306 states that a party may nominate a replacement candidate due to "death, physical, mental or **other incapacity**" of the duly nominated candidate. It is our position that the unilateral withdrawal by Mr. Bodenweiser constitutes "other incapacity" and we therefore submit the enclosed Supplemental Certificate.

To the extent you have any doubt that Mr. Bodenweiser's decision to withdraw gives the party the right to name a replacement candidate, it is important to remember that election laws are to be liberally construed. Giving voters a choice, and the right to a fair and honest election is paramount. Neither the voters nor any political party should have to depend on a cumbersome write-in process where the ballot problem is not a creature of their making. The Court of Chancery has observed that:

> Election laws are not merely technical creatures creating or regulating private rights. They are of transcending public importance, touching upon – indeed giving vitality to – the most fundamental of our rights. Thus, . . . the right of the public to an open, effective . . . election is a right that enters importantly into [any] analysis.

Bartley v. Davis, Del.Ch., C.A.No. 8561, Allen, C., (Aug. 14, 1986) slip op. at 27. Chancellor Allen went on to observe that in applying the Election Code one is to "try to give to the applicable legislative words the meaning and effect that best fosters and promotes the attainment of these purposes [i.e., the right to free and equal elections]."

With these broad principles in mind, then, the unilateral withdrawal of a candidate -- for whatever reason – must be viewed as an "incapacity," whether physical, mental or "other."

Indeed, the term "other" was obviously intended to catch all other situations not covered by the words "physical," or "mental." Otherwise, the inclusion of the word would make no sense.

In keeping with these important principles of our democracy, and the rule that election laws are to be liberally construed, we ask that you put Mr. Pettyjohn on the ballot. You may recall that in New Jersey several years ago, the Democratic Party sought to replace its original candidate for United States Senate with a new candidate after the "deadline" for naming candidates had passed and the original candidate, Robert Torricelli, withdrew. Nothing in the statute allowed such replacement, but the New Jersey Supreme Court directed that the replacement candidate's name be placed on the ballot. In doing so, the Court observed:

> It is in the public interest and the general intent of the election laws to preserve the two-party system and to submit to the electorate a ballot bearing the names of candidates of both major political parties as well as of all other qualifying parties and groups. . . . statutes providing requirements for a candidate's name to appear on the ballot will not be construed so as to deprive the voters of the opportunity to make a choice. . . . We do not believe that our Legislature intended to limit voters' choice in a case where there is sufficient time to place a new candidate on the ballot and conduct the election in an orderly manner.

New Jersey Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1034-35, 1036, 1039 (N.J. 2002). These same ideas are just as applicable in Delaware.

Because the general election is now less than 3 weeks away, if you do not intend put Mr. Pettyjohn's name on the ballot, I ask that you let me know immediately. Thank you.

Very truly yours,

Jerry Wood, Chairman

Sussex County Republican Committee

Supplemental Certificate of Nomination

TO: Sussex County Board of Elections

FROM: Jerry Wood, Chairman

Pursuant to the provisions of Title 15, Section 3306 of the Delaware Code, we do hereby certify that the persons set forth below were nominated for the following positions:

Delaware State Senate:

19th District: Brian G. Pettyjohn

3 Cinder Way

Georgetown, DE 19947

IN WITNESS THEREOF, the undersigned, being the Presiding Officer and Secretary of the Sussex County Republican Committee, do hereby set forth their hands this 18th day of October, 2012.

Jerry Wood

36272 Nubbin Cove

Frankford, DE

Carol A. Bodine

24 Wedgefield Blvd.

Ocean View, DE

BE IT REMEMBERED THAT ON THIS 18th day of October, 2012 personally came before me, the Subscriber, a notary public for the State and County aforesaid, Jerry Wood and Carol A. Bodine, party to this instrument in Writing to be their deed.

GIVEN under my HAND and SEAL the day and year aforesaid.

DAWN M. CAREY
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires on 1/13/2016

Notary Public

Dawn Carey

Name

My commission expires: 1/13/16

EXHIBIT B

STATE OF DELAWARE
office of the
STATE ELECTION COMMISSIONER

Elaine Manlove
Commissioner of Elections

October 18, 2012

PHONE (302) 739-4277
FAX (302) 739-6794

Mr. Jerry Wood, Chairman
Sussex County Republican Committee
Box 388
Georgetown, DE 19947

Dear Mr. Wood:

Thank you for your letter dated October 18, 2012 containing a Supplemental Certificate of Nomination for Mr. Brian Pettyjohn as the Republican candidate for State Senate for the 19th senatorial district. As I read your letter, you believe that the withdrawal by Eric Bodenweiser is itself incapacity. I do not agree with your interpretation of 15 *Del. C.* § 3306. Section 3306 reads, in pertinent part, as follows:

> Whenever it shall be determined, subsequent to the dates specified in § 3303 of this title, that a duly nominated candidate will be unable to serve if elected because of death, physical, mental or other incapacity, the state, county or city (if a municipality holds its election at the time of the general election) committee shall convene within 24 hours of said determination to authorize the filing of a supplemental certificate of nomination for a substitute candidate…

15 *Del. C* § 3306(a)

The proper inquiry is the nature of the Mr. Bodenweiser's incapacity that would make him unable to serve, if elected. Therefore, please identify the mental, physical or other incapacity that would make Mr. Bodenweiser's unable to serve if elected. I cannot accept a supplemental Certificate of Nomination prior to receiving the information necessary to support a finding of incapacity.

Thank you.

Very truly yours,

Elaine Manlove
State Election Commissioner

EXHIBIT C

STATE OF DELAWARE
office of the
STATE ELECTION COMMISSIONER

Elaine Manlove
Commissioner of Elections

PHONE (302) 739-4277
FAX (302) 739-6794

October 24, 2012

(Via E-Mail)

Mr. Jerry Wood, Chairman
Sussex County Republican Committee
Box 388
Georgetown, DE 19948

Dear Mr. Wood:

On October 18, 2012, I asked that the Sussex County Republican Committee identify the mental, physical or other incapacity that would make Mr. Bodenweiser unable to serve if elected and information to support a finding of such incapacity. To date, I have received no such identification or supporting information. Therefore, today, I am confirming my October 18 determination that there is no incapacity and completing preparations to conduct an election for the 19th Senate District seat without a Republican candidate.

Very truly yours,

Elaine Manlove

Elaine Manlove
State Election Commissioner

Cc: Richard Forsten, Esq.
Elizabeth D. Maron, Esq.
A. Ann Woolfolk, Deputy Attorney General
Kenneth McDowell, Director, Dept. of Elections for Sussex County
Jean Turner, Deputy Director, Dept. of Elections for Sussex County

EXHIBIT D

Not Reported in A.2d, 1986 WL 8810 (Del.Ch.)
(Cite as: 1986 WL 8810 (Del.Ch.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.
Brian J. **BARTLEY**, Plaintiff,
v.
John G. **DAVIS**, Jr., State Election Commissioner of the State of Delaware, Charles M. Oberly, III, Individually, and in his capacity as Attorney General of the State of Delaware, Department of Elections of Kent County, Department of Elections of New Castle County, and Department of Elections of Sussex County, Defendants.

Submitted: Aug. 8, 1986.
Decided: Aug. 14, 1986.

Clark W. Furlow of Lassen, Smith, Katzenstein & Furlow, Wilmington, for plaintiff.

Henry N. Herndon, Jr., Edward M. McNally, and Lewis H. Lazarus of Morris, James, Hitchens & Williams, Wilmington, for defendant Charles M. Oberly, III, Individually.

Harrold Schmittinger, and William M. Pepper of Schmittinger & Rodriguez, P.A., Dover, for defendant John G. Davis, Jr., State Election Commissioner.

MEMORANDUM OPINION

ALLEN, Chancellor.

***1** In this action Brian J. Bartley, a candidate for the Democratic Party's nomination for the office of Attorney General, seeks a declaratory judgment that Charles M. Oberly, III, the incumbent Attorney General, has failed to comply with the election laws of the State of Delaware governing registration of candidacy. Premised upon this assertion Mr. Bartley seeks an order excluding Mr. Oberly's name from the ballot at the September 6, 1986 Democratic Party primary election. The result of such an order would be to leave Mr. Bartley as the sole qualified candidate for the Democratic Party nomination for this office.

Defendant Oberly contends he has fully complied with the statutory requirements for declaring his candidacy and that a judicial determination that he has not would, in any event, not support the relief requested in light of all of the surrounding circumstances.

The litigation was commenced on July 31, 1986 by the filing of a verified complaint and a motion for a temporary restraining order. The requested restraining order sought to restrain defendant John G. Davis, the Election Commissioner of the State of Delaware, from including Oberly's name on the list Mr. Davis was to furnish to the various county departments of election of duly registered candidates for public office. That application for emergency relief was denied based upon a finding of an insufficient threat of immediate injury.[FN1] At that time, due to the shortness of time before the scheduled primary election, the case was set down for final hearing for August 8, 1986.

Following expedited discovery, the parties were unable to stipulate to all relevant facts and therefore evidence was taken at the one-day, August 8 trial. This memorandum opinion incorporates my findings of facts and conclusions of law with respect to the issues raised by the pleadings. A thumbnail sketch of the relevant statutory framework (Section I) precedes a statement of the relevant facts as I find them based upon a preponderance of tne admissible evidence (Section II). Lastly, I discuss the legal issues raised by the facts and articulate the reasoning that leads me to the opinion here reached (Section III).

I

Primary elections are a recent innovation in Delaware political life. Our law had traditionally recognized the nominating convention as an appropriate means for the major political parties to select their candidates for public office. First introduced in 1969[FN2] in a limited way, the primary election became in 1970 the principal method for selection of nominees when more than one qualified person sought that privilege.

Currently the first official step necessary for one seeking his party's designation as its nominee for public office is a public filing mandated by Section 3106(a) of Title 15 of the Delaware Code. That section provides in relevant part:

> (a) Any person desiring to be a candidate shall give notice in the following manner:
>
> (1) Candidates for statewide office:
>
> a. Any statewide candidate shall notify the chairman of the state committee of his respective political party, or his designee in writing, on forms prescribed by the State Election Commissioner on or before the deadline set forth in § 3101(1) of this title.
>
> *2 b. At the time of giving notice as required above, each candidate shall tender the required filing fee, if any, by giving a check to the State Election Commissioner, payable to the state committee of the candidate's political party, together with a copy of the notice given the party's state chairman. At such time, the Commissioner shall receipt a third copy of said notice, to be provided the candidate.

The filing fee required by § 3106(a)(1)(b) is to be "set by the state executive committee of the respective political party", 15 *Del. C.* § 3103(a)(1), and "[t]he state chairman...of each political party shall notify the State Election Commissioner...of the filing fee set pursuant to this section...[which] notification shall be no later than July 1 of each general election year". 15 *Del. C.* § 3103(c).

The "deadline" for filing notification of candidacy is fixed at 12:00 noon of the last Friday in July. 15 *Del. C.* § 310-1(1). Once duly filed, a candidate may change the office for which he is a candidate or may simply withdraw prior to 12:00 of the first Friday of August. 15 *Del. C.* § 3101(2), (4).

In each election district in which there is a contest for any office, 15 *Del. C.* § 3105, a direct primary election is to be held on the first Saturday following the first Monday of September. 15 *Del. C.* § 3101(3).

II.

On June 5, 1986 Samuel L. Shipley, state chairman of the Democratic Party notified defendant Davis in writing that "all candidates filing for U.S. Representative, Attorney General, Auditor and Treasurer should pay a filing fee of 1% of the total term income for each one of these offices". This notice continued the practice of recent years of fixing the filing fee for Democratic candidates at the maximum permitted by the statute. One percent of the salary of office of Attorney General for the next term of that office would be $2,716. Mr. Oberly, when filing his notification of candidacy presented his check in the amount of $1,291. The circumstances leading to his decision to tender a check in an amount $1,425 less than the amount fixed by Mr. Shipley's June 5 letter provide an important part of the factual setting of this lawsuit.

The story begins with the fact that in 1982 the Democratic Party contributed $1,000 to the political campaigns of other Democratic candidates for statewide office, but contributed only $100 to Mr. Oberly's campaign. This disparate treatment was not lost on Mr. Oberly and he has felt that the Democratic Party "owed" him some financial support as a result, although he acknowledges the obligation is in no sense a legal debt. Mr. Oberly called this different treatment to Mr. Shipley's attention earlier this year and Mr. Shipley, as a result, in May, 1986 made a contribution to Mr. Oberly's 1986 campaign in the amount of $475. Mr. Oberly, was not satisfied with this gesture, and he com-

plained to Mr. Shipley that more was due him, to which Mr. Shipley in late May replied that if more was due Oberly, it could be dealt with later. Thus, as of the end of May, Mr. Oberly apparently felt that the Democratic party "owed" his campaign $425, in fairness but not in law.

*3 Shipley, acting presumably on behalf of the party executive committee, had set the filing fee in writing prior to July 1 as the statute contemplates. By mid-July, Oberly who had not yet filed his notification of candidacy, requested that Shipley hold a meeting at which representatives of each of the principal campaigns could discuss the party's support for their 1986 efforts. Such a meeting was held on July 16 and was in some respects acrimonious. Oberly demanded financial support from the party. As a result, Mr. Shipley agreed "to waive" $1,000 of the filing fee for each statewide office[FN3] and, with respect to Mr. Oberly's further claim to additional financial support (*i.e.,* the balance which he regarded himself as owed by the party from the 1982 campaign), Mr. Shipley agreed whatever the right number was, it would be "made up".

On July 17, Shipley called Election Commissioner Davis and told him that he was going to waive $1,000 of the filing fee "for everybody". Davis agreed but within hours he had decided that he had made a mistake. His view was, and remained the correct one: that the appropriate way for a political party to support a campaign after July 1 when the filing fee amount has been set, was to collect the full fee and then "rebate" or return to the campaign such part of the filing fee as was appropriate in the party's judgment, consistent with the state campaign financing laws. The problem with a "waiver" after July 1 in Mr. Davis's view was that it did not seem to be authorized by the statute, could lead to administrative problems in his office and might result in a campaign contribution in excess of amounts authorized by law.

Mr. Davis called Deputy Attorney General Robert Willard who is assigned to provide legal advice to the State Election Commissioner and raised his concerns. Mr. Davis was concerned that .his acquiescence in Mr. Shipley's proposed reduction was not well-founded and that he might have thereby put Mr. Shipley in an awkward position with his candidates. He hoped Mr. Willard would see a legal way out of this perceived problem. According to Mr. Davis, Willard, after doing some brief legal research, advised him that, based upon his interpretation of a 1976 legal opinion signed by then Attorney General Richard Wier, he, Willard, was of the view that the party could waive some or all of the filing fee after July 1 and any amount so waived would not constitute a contribution for Campaign Financing and Disclosure Act purposes. Mr. Davis asked to see a copy of the 1976 opinion.

Mr. Davis was apparently not altogether satisfied that Mr. Willard's view was sound. On July 21 he called Mr. Shipley and told him that Mr. Shipley could return to candidates some part or all of the filing fee without having that amount count as a "contribution" but that Davis would insist upon collecting the full filing fee as set on July 1. Shipley replied that he would have a problem with Mr. Oberly.

On July 22 Mr. Davis sent Mr. Shipley a confirming letter, which reads in part as follows:

> *4 This is a confirmation of our phone conversation of 7-21-86. As I stated you *cannot* waive the filing fee for particular candidates or change the filing fees after July lst. In your letter to me of June 5, 1986, you stated the filing fees for Democrats on the statewide ticket would be 1% of their total compensation...
>
> Title 15 Chapter 3103(c) states that these fees will be established no later than July lst. Therefore, my agency must request a check from each candidate for the full amount stated above.
>
> As I mentioned to you on the phone the Democrat State Committee has the option of minimizing any financial hardship this may cause. The State Committee may refund part or all of the fil-

ing fee and not have it count against the legally allowable maximum campaign contribution limit. If the State Committee chooses this option, they must make it clear on the committee's records and the candidate's records that the expenditure is a rebated filing fee. This arrangement is allowable based on an Attorney General's opinion of former A.G. Wier issued in 1977. This opinion cautions against the unequal application of filing fee rebating. I would urge you to treat all candidates equally. As always, if you have any questions feel free to call. (Exhibit H)

On July 23 Mr. Shipley raised a question with Mr. Oberly concerning the legality of any waiver after July 1. Oberly responded that Mr. Wier's 1976 opinion covered that point. Oberly testified that about this time a member of his staff informed him that on July 21 Mr. Willard had written an opinion to Mr. Davis on this subject. On the 23rd, Oberly read Mr. Willard's letter to Mr. Davis and the 1976 Attorney General's opinion it enclosed. Mr. Oberly testified that he relied upon the 1976 opinion and Mr. Willard's interpretation of it in concluding that, in the circumstances, he could satisfy the filing requirements by tendering a check for $1,425 less than the amount fixed as the filing fee for the office he sought. His view was predicated upon the legal theory that Mr. Shipley could "waive" a portion of the filing fee after July 1 and upon the factual assertion that Shipley had done (or would do) so to the extent of $1,425 in his case.

Mr. Willard's "opinion" to Mr. Davis did no more than send along a copy of the 1976 opinion to Mr. Davis and concluded that that 1976 opinion "expressly held that such waiver or reimbursement is permissible". The 1976 opinion, which Mr. Davis received on July 24 and which Mr. Oberly read for the first time on July 23, does not deal with the question whether a political party may waive some or all of a filing fee. It addresses the question whether, *if* such a fee is waived or returned, the party has thereby made a "contribution" for purposes of the Campaign Financing and Disclosure Act. Thus, it assumes but does not discuss the critical question that faced Mr. Davis and Mr. Oberly.

The 1976 opinion plays a central part in this narrative and thus deserves to be quoted at length:

***5** Dear Commissioner Wrightson:

This opinion concludes that a "filing fee" paid pursuant to 15 *Del. C.* § 3103 as effectuated by party resolution or rule, is *not* a "contribution" within the meaning or intent of the Campaign Financing and Disclosure Act of 1974 and, therefore, is not subject to the limitations imposed by that act.

This [filing fee] requirement has long been a method to effectuate the above purposes and past political practice, according to the Chairmen of the Delaware Democratic and Republican Parties, has permitted this requirement to be waived. [FN4] It is clear that the fee serves, not the individual candidacy of any one person, but in fact serves the general and proper interests of the political parties and of the public.

Finally, the refund of all or a portion of that fee is, for the reasons discussed above, not a "contribution" in view of the fact that that return is merely the reimbursement to the candidate of money he himself has given. [FN1] To conclude that he has contributed to himself would emasculate the fee requirement and ignore the realities of the reason for the fee. In addition, should the party waive the fee this would not be a contribution for it is simply waiving a statutorily-permitted requirement. If such a waiver were construed to be a contribution. the candidate would be in the anomalous position of having to disclose that he received something he never received, the candidate would be precluded from receiving anything from the party or political committee should the fee exceed the statutory limit and the party or political committee would be in violation of the Campaign Financing and Disclosure Act

should the fee set by statute and/or party rule exceed the contribution limits. Clearly, such an absurd and impractical result was not intended by the framers of the above laws.

> FN1. Of course, if the funds used to cover the filing fee were contributed by the candidate's supporters and those funds were returned to the candidate by the political committee, the candidate would either have to return them to the donors or list the donations as contributions.

Thus, in the discretion of the appropriate political entity all or a portion of a filing fee may be returned and that return or refund is not a "contribution" within the meaning of the Campaign Financing and Disclosure Act of 1974 and not covered by the limits imposed by that act.

Mr. Oberly having been apprised by Shipley that Davis was taking the position that the law required the payment of the full filing fee but would permit the party to return some or all of it without it counting as a "contribution", decided to place all his weight upon the validity of his office's expansive interpretation of the 1976 opinion and to therefore present a filing fee that reflected a deduction of $1,000 (as Shipley had agreed on July 16) as well as a deduction of $425 (the amount Mr. Oberly claimed he was due from 1982). Thus when Mr. Oberly arrived at Mr. Davis's office on July 24 to file his notification of candidacy, he presented a check for $1,291 (that is the $2,716 stated fee less $1,425).

*6 Mr. Davis resisted accepting that amount; he stated that he didn't agree with the interpretation of the 1976 opinion which Mr. Oberly cited as authority for Mr. Davis accepting less than the stated filing fee; Davis stated his view that the best way to handle the situation was for all candidates to pay the full filing fee and then for the party to return some part or all of the fee, if that was its wish.

Mr. Oberly would not acquiesce in this approach. He insisted that the 1976 opinion meant that the approach he wished to follow was legally permissible. In taking this position, Mr. Oberly assumed that (as the 1976 opinion did hold) a political party could rebate or refund to a candidate more than $1,000 without violating the Campaign Financing and Disclosure Act (a proposition about which I entertain substantial doubt). Thus, in his mind, his approach was preferrable to him for two reasons: first, his campaign would not have to wait for the Democratic Party to rebate $1,425 and, second, he would not have to bear any risk that the party, for whatever reason, might not rebate the entire $1,425. Mr. Davis testified that Mr. Oberly was explicit concerning his motivation; in 1982 he had not been treated as others had and he was not going to be put at risk of similar treatment in 1986.

Mr. Davis then said he would accept Mr. Oberly's tendered filing if Mr. Oberly would state in writing that it was proper[FN5] and if Mr. Shipley informed him that he was agreeable to waiving the $1,425 amount.

On the evening of July 24, Mr. Oberly encountered Mr. Shipley at a social event and informed him that he had filed that morning and that he had paid a filing fee of $1,291. Up to this point, Mr. Shipley had, so far as the record discloses, not focused upon or determined a specific amount above $1,000 that he would be agreeable to waive for Mr. Oberly as a result of the 1982 unequal treatment. That specific amount had been left open at the July 16 meeting of all candidates.

On the morning of the 25th, Mr. Oberly called Mr. Shipley and asked him to call Mr. Davis to waive $1,425 of his filing fee. Shipley then called Mr. Davis and stated that he was waiving that amount.

Plaintiff Brian Bartley appeared at Mr. Davis's office shortly before the deadline for filing of notification of candidacy. He was informed by Mr. Davis that Mr. Shipley had waived $1,425 of the

filing fee for the Office of Attorney General. Bartley asked to see the opinion that purported to authorize such waiver and, after reviewing it, stated he wished to submit the full filing fee as he did not think the waiver was in accordance with law. Bartley then submitted his check in the full amount fixed prior to July 1.

On July 31 the Democratic State Committee met by telephone and adopted resolutions reciting that Mr. Shipley was authorized to waive a portion of the filing fee for the office of Attorney General and directing that the Chairman reimburse any candidate for that office any amount paid as a filing fee by any such candidate in excess of $1,291.

*7 On August 1, 1986 Mr. Oberly, on the advice of counsel submitted his check in the amount of $1,425 to the State Election Commissioner. He asked that this check be returned to him once the Election Commissioner determined that "the Democratic State Committee action properly limited the applicable fee to the amount initially tendered on July 24." Mr. Davis returned this check to Mr. Oberly stating that his interpretation of 15 *Del. C.* § 106(a) (1)(b) led him to the conclusion that he had no authority to accept any filing fee after the deadline fixed by 15 *Del. C.* § 3101(1).

III.

As I view this matter it presents two broad legal issues. First, does Chapter 31 of Title 15 contemplate or permit the executive committee of a political party after July 1 in an election year to reduce the amount of a filing fee fixed pursuant to Section 3103(c)? If the answer to that legal question is yes, several subsidiary questions arise: must such a waiver or reduction be uniform for all candidates for any particular office; does such a reduction constitute a "contribution" subject to the limitations of the Delaware Campaign Financing and Disclosure Act; and was such a waiver or reduction properly granted in this instance. Because I conclude that the Delaware statutes do not contemplate or permit modification of the filing fees required after July 1 of an election year, however, I find it unnecessary to address these subsidiary questions.

The second range of legal questions arise because our statutes do not expressly state what the consequences of an imperfect filing under Section 3106 of Title 15 may be. Thus, the question arises whether, despite his failure to tender the full amount fixed by his party on July 1, Mr. Oberly's name should be certified by defendant Davis to the various county departments of election as a candidate for the Democratic Party's nomination for the office of Attorney General. This inquiry is in my view a factually specific one that requires judicial sensitivity to the underlying purposes sought to be achieved by the General Assembly in enacting the comprehensive statutory scheme that regulates primary elections in our State.

Each of these issues will be discussed in turn.

A.

Defendant Oberly makes essentially two arguments supporting his contention that a political party may reduce or waive a filing fee after July 1. The first is statutory, the other rests on common law principles.

The statutory argument rests heavily upon certain language of 15 *Del. C.* §§ 3106(a) and (b) which provide in relevant part as follows:

> At the time of giving notice as required above, each candidate *shall tender the required filing fee, if any,* by giving a check to the State Election Commissioner, payable to the state committee of the candidate's political party...". (Section 3106(a)(1(b))
>
> *If any of the filing fees* mentioned in subsection (a) of this section *are not required,* each candidate shall still give notice...as specified in paragraphs (1) and (2) of subsection (a) of this section... (emphasis added).

***8** Mr. Oberly claims that this statutory language is an express recognition that the state exec-

utive committee may agree with a candidate not to "require" any filing fee at any time prior to the candidate's filing of his or her notice of candidacy.

I cannot so construe these provisions. The "if any" language has, in my opinion, a much more specific and limited reason for inclusion. Most importantly, Section 3103 which establishes the procedure by which fees are to be set, specifically provides that "the filing fee shall not be greater than 1% of the total salary ...except that no filing fee shall be required where a person is indigent...". Thus the "if any" language in Section 3106 is necessary to cover the situation in which an indigent person seeks to qualify for his or her party's nomination to public office.[FN6] To read that language more broadly than required by this statutorily recognized special situation not only finds no support in the statute itself, but would be inconsistent with the requirement that the Election Commissioner be notified of the amount of the filing fee. If the "required filing fee", 15 *Del. C.* § 3106(a)(1)(b), is not intended to be the fee of which the Commissioner is notified, 15 *Del. C.* § 3103, what purpose is to be served by notifying the Commissioner of the amount fixed as a filing fee, as the statute requires? Moreover, this broad interpretation of the "if any" language would also render meaningless the requirement that fees be fixed by July 1.

Accordingly, I conclude that the statutory argument proffered by defendant Oberly finds no adequate support in the language of the statute and must be rejected. The common law argument urged by Mr. Oberly asserts that the purpose of the filing fee is to support the political parties financially and that the law recognizes in many contexts that a person may voluntarily waive a right created for his benefit. The premise of this argument -that the statute involved was enacted for the benefit of Delaware's political parties-is, however, flawed.

It is correct that the statute regulating primary elections does give a right to political parties to receive the proceeds of filing fees paid by persons seeking that party's nomination. The statute also creates the right, within set limits, to determine what those fees will be. To the extent political parties wish to forego financial benefit from such statutes they may of course do so by simply setting the fees lower than the maximum permissible. But there is more involved here than a private right to receive money; it is the public interest in the framework created by the statute that renders defendant's waiver argument inappropriate.

In requiring that filing fees be established by a filing with a public agency and that this be done "no later than July 1," 15 *Del. C.* § 3103(c), the General Assembly obviously intended to protect the interests of citizens (1) in knowing what a particular office's filing fee was; and (2) in having time to consider, with that information in hand, whether to seek a nomination. These are "rights" or "protected interests" that members of the public have in the statutory scheme. These "rights" of the public may not be abrogated by a political party, but to adopt defendants waiver argument would, in effect, do so since to accept the argument that a political party may at the last moment substantially reduce the filing fee for the office of Attorney General (or any office) would mean any interested member of the public who understood, during the statutory period from July 1, that the filing fee was higher would have been misled.

***9** While I find no basis to conclude that Mr. Shipley or anyone else sought to manipulate the setting of the filing fee for any inappropriate purpose, acceptance of defendant's argument would leave open the possibility of inappropriate manipulation in the future. A filing fee could be set on July 1 at a rate designed to deter interested persons of modest means, only to be reduced or waived at the last moment for favored persons. This possibility, even though limited by the statutory maximum on filing fees, is inconsistent with the apparent purpose of the statute which requires public action as to fees and guarantees a time period following July 1 when interested persons can decide whether to file or not.

Thus, I conclude that a political party has no

power to reduce or waive filing fees after July 1 of an election year and Mr. Shipley's attempt to do so was inconsistent with Section 3103 of Title 15 and of no effect. It follows that Mr. Oberly did not, as of "the last Friday in July," 15 *Del. C.* § 3101(1), give notice of his candidacy in the way required by Section 3106. I turn then to a discussion of the consequences of this failure in the circumstances presented.

B.

Mr. Bartley claims that one who has not fully and completely complied with the prerequistes to candidacy, within the times provided, cannot be certified by the Commissioner of Elections and his name may not appear on a primary election ballot. The argument has a certain intuitive appeal. Before it can be accepted (or rejected), however, a more discriminating analysis must be undertaken. The law has long recognized that, in certain contexts, statutory words that appear mandatory in form may be construed as directory only. This principle has been recognized in Delaware as having application, in appropriate circumstances, where our election laws are involved. *See, State ex rel. Stabler v. Whittington,* Del. Super., 290 A.2d 659 (1972).

Since Mr. Oberly did tender the appropriate balance of the filing fee on August 1, the dispositive issue in this case may be cast as whether the time limit of Section 3101 (requiring notification of candidacy by the last Friday in July) is mandatory or directory. stated more particularly, I construe the dispositive legal question here presented to be whether a person who relies in good faith[FN7] upon an incorrect view of the law concerning the amount of the necessary filing fee, should nevertheless be certified as a candidate for a party's nomination where the proper fee is thereafter tendered before the termination of the statutory period for withdrawal (and therefore before the time fixed by the statute for certification by the Commissioner of Elections to the county department of elections of the names of the candidates) and where such person has otherwise satisfied the statutory criteria.[FN8]

In this inquiry one must look beneath the surface of the statutory words to try to determine the purposes underlying the statute. In doing so we start with an observation of elemental importance in this case. Election laws are not merely technical creatures creating or regulating private rights. They are of transcending public importance, touching upon-indeed giving vitality to-the most fundamental of our rights. Thus, in a case of this kind the right of the public to an open, effective primary election is a right that enters importantly into the analysis.

***10** The Delaware Supreme Court has had occasion to review the constitutionality of the statutes fixing a filing fee for candidates for public office. In doing so that Court has identified three purposes sought to be achieved by that requirement:

> "(1) a desire that only serious, good faith candidates place their names on the ballot; (2) to provide support for political parties so as to encourage and strengthen them; (3) to limit the number of candidates so that the machinery set up by the Legislature for the purposes of electing public officials will not become inoperative." *Cassidy v. Willis,* Del. Supr., 323 A.2d 598, 609, *aff'd. mem.,* 419 U.S. 1042 (1974).

To this short list of public purposes served by the filing fee requirement may be added the more general purposes announced by the General Assembly in enacting our election laws:

> The purpose of this title is to assure the people's right to free and equal elections, as guaranteed by our state Constitution. To that end, the full exercise of that right demands that the people be afforded the means to form political parties, nominate candidates and cast ballots for whomever they choose.

To secure the right to free and equal elections and to preserve the integrity of the democratic political process, it is essential that an orderly system be established:

(2) To encourage public participation in political parties and to demonstrate sufficient community support of these parties by permitting voters to affiliate with the party of their choice, if they so desire, on their voter registration records; (3) To provide a means by which political parties and unaffiliated candidates, which have demonstrated a meaningful level of community support, may qualify for listing on the general election ballot; (4) For the orderly and fair selection of party nominees by primary election or political party convention, and for the filling of vacancies among such nominees;... 15 *Del. C.* § 101A.

The Court's function then in rendering an opinion on the stated question is to try to give to the applicable legislative words the meaning and effect that best fosters and promotes the attainment of these underlying purposes. This function is made necessary by the fact that the statutory language itself does not state the consequences of a failure to tender the full filing fee before the time fixed.

I conclude that, the purposes of the election laws would be more surely advanced and important public interests more likely protected by a construction that, in the particular circumstances here present, holds the date for submitting the full fee not to be mandatory in the sense that failure to meet such date constitutes in all cases an absolute disqualification for candidacy. The circumstances to which I refer and which delimit the scope of this holding are (1) the good faith belief that a timely filing has been made, including the tendering of a filing fee and (2) the tendering of the correct amount of the fee prior to the time the Election Commissioner is required to report the names of the candidates to the county department of elections. These factors, together with the acknowledgement of the electors paramount interest in having an effectively functioning primary election, require the result reached, in my view.

***11** The decision is not an easy one. Delaware case law provides little guidance and cases from other jurisdictions are not uniform in their approach. One authority concludes, after a review of pertinent cases, as follows:

> The most frequently occurring problem in connection with the meaning of filing fee statutes is whether the fee, admittedly due, has been paid within the time prescribed by the law; and in answering it the tendency of the courts has been to construe the provisions liberally in favor of the candidate. Annot., Validity and Effect of Statutes Exacting Filing Fee From Candidates for Public Office, 89 A.L.R.2d 864 (1963).

See, e.q., Lake v. Zavala County Democratic Executive Committee, Tex.Civ.App., 355 S.W.2d 219 (1962); *State ex rel. Schulman v. Cuyahoga County Board of Elections,* Ohio Ct.App., 145 N.E.2d 149, *aff'd.,* 145 N.E.2d 666 (1957); *Hingle v. Plaquemines Parish Democratic Executive Committee,* La.Supr., 33 So.2d 203 (1947). Each of these cases, and others reaching a similar result but not here cited, may, however, be distinguished on their facts from the facts that this case presents.

Mr. Oberly's case is less compelling than some of those cited since they typically deal with prospective candidates who have been misled by official action, *see e.g., Hingle v. Plaquemines Parish Democratic Executive Committee, supra,* or who were otherwise the victims of circumstance (*see, e.g., Fisher v. Dallas County Democratic Executive Committee,* Tex.Civ.App., 333 S.W.2d 604 (1960). Mr. Oberly has not been misled by official action. He acted on his own strongly held view of the applicable law. It may be said that, unlike others who may be in some circumstances excused from the consequences of a misunderstanding, he ought, as a lawyer, not be so excused-having aggressively pressed and acted upon his incorrect view of the law in the face of a clear statement by the Election Commissioner that he should pay the fee fixed on July 1. Indeed, it is hard to imagine that any other prospective candidate would have felt the confidence or authority necessary to stick to such a position in light of the Election Commissioner's clear

position. Occasions to make elections are common in the law and even in criminal prosecutions individuals are frequently burdened with the consequences of elections made advisedly, albeit on what turns out to be an incorrect understanding of the law. *See, Williams v. Floyd,* La.Ct.App., 436 So.2d 771 (1983). However, having found that Mr. Oberly has acted in good faith and being sensitive to the interests of the electors in the matter, I conclude that the statutory time fixed in this instance for submitting the full filing fee should, in light of all of the surrounding circumstances, be regarded as directory and not mandatory in this instance. *See, Merz v. Volberding,* Ill. App. Ct., 419 N.E.2d 628, 633 (1981) (name of incumbent city clerk who relied upon his own incorrect understanding of law in submitting nominating petition permitted to be placed on ballot in order to not "penalize...the voters").

***12** Therefore, I will order Mr. Davis, upon receipt of a check from Mr. Oberly in the amount of $1,425, to certify his name to the appropriate departments of election as a candidate for the Democratic Party nomination for the office of Attorney General. IT IS SO ORDERED.

FN1. Mr. Davis has, apparently on the advice of independent counsel, voluntarily refrained from certifying candidates for the office of Attorney General pending the outcome of this litigation.

FN2. 57 Del. Laws 241, § 8 (1969) conferred upon a potential candidate the right to force a primary if he had garnered 35% of the vote at the party's nominating convention.

FN3. It is not clear whether Mr. Shipley's intent at that time was to in effect reduce the filing fee by $1,000 for all statewide offices or to do so only for each of the prospective candidates whose campaigns were represented at that meeting.

FN4. At the time this Opinion was written the statute did not require that the filing fee be set by July 1 but permitted it to be set at any time prior to the registration deadline.

FN5. The witnesses disagree as to whether Mr. Davis requested Mr. Oberly's legal opinion (as Mr. Davis testified) or simply a confirmation that Mr. Shipley had waived a part of the fee (as Mr. Oberly recalls). I need not resolve this difference in light of the way I analyze the issues presented.

FN6. In addition, it would seem possible under our statutes for a political party to set a filing fee at zero. The statute sets a maximum but no minimum. The "if any" language would also be necessary to admit the possibility of such a fee.

FN7. I find Mr. Oberly, in taking the aggressive position with the Election Commissioner that he did take, relied in good faith upon the mistaken view of Mr. Willard that the law permitted the waiver after July 1 by the Democratic Party of $1425 of the filing fee required for the office of Attorney General.

FN8. Plaintiff also attacks the sufficiency of Oberly's July 24 notification in that he used a post office box address rather than his "address where registered" as required by the filing form. I do not regard this lapse as material and thus do not believe that substantial rights may be made to turn upon it. The Election Commissioner takes a similar position in this litigation.

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